



No. 84-747

IN THE
Supreme Court Of The United States

October Term, 1984

DONALD N. LLOYD AND JESSICA LLOYD,
Petitioners,

Versus

PROFESSIONAL REALTY SERVICES, INC.,
RAIFORD ELLIS, JAMES O. RICHARDS,
LOURAINÉ D. BERRY, ALLAN W. HOOPER, JR.
AND RICHARD SIDWELL,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Petitioners commenced this action against Respondents for violation of the registration requirements under the Securities Act of Alabama, for common law fraud, and for fraud under the Securities Act of 1933 and the Securities Exchange Act of 1934.

This action was tried in the United States District Court for the Northern District of Alabama, Southern Division, before the Honorable U. W. Clemon. At the close of Peti-

tioners' evidence, the trial court granted Respondents directed verdicts on all fraud claims and on the claim for sale of stock of an insolvent corporation, which latter claim was not raised by Petitioners in their complaint or in the pre-trial order. Upon the close of all the evidence in the case, the trial court granted Respondents a directed verdict on the non-registration claim.

Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit. Following briefing and oral argument, the Eleventh Circuit affirmed the directed verdicts, holding that there was insufficient evidence to go to the jury on Petitioners' claims. The Eleventh Circuit's judgment was entered on June 22, 1984.

Respondents do not agree with Petitioners' statement of the case in its entirety; however, it would not facilitate the Court's consideration of the Petition to dispute the statements point by point at this juncture.

SUMMARY OF THE ARGUMENT

This case does not present a controlling question of law, nor a legal issue appropriate for review by certiorari under Supreme Court Rule 17.1 or otherwise. Although various alternative arguments were raised in both the district court and court of appeals, the Eleventh Circuit affirmed the directed verdicts on the basis that there was insufficient evidence to go to the jury. In reviewing the decision of the Eleventh Circuit, this Court's scope of review would be reduced to determining from the record whether Petitioners adduced substantial evidence so as to survive a motion for directed verdict. This review (a routine matter by the courts of appeal) was capably discharged by the Eleventh Circuit. Therefore, the Petition should be summarily overruled.

ARGUMENT

Respondents address in order each of the questions for review presented by Petitioners.

1. *Knowledge of Violation of Uniform Securities Act as Waiver of Right to Rescind.*

Petitioners assert that the Writ should issue because the Eleventh Circuit erred in holding that waiver and estoppel are defenses to a purchaser's action for rescission under the Securities Act of Alabama. A reading of the Eleventh Circuit's opinion, however, reveals that the court did not decide the case on the basis of waiver and estoppel. The court simply held that there was not sufficient evidence to go to the jury on Petitioners' claims.

Petitioners claimed that Respondents were liable to them for (1) selling stock of an insolvent corporation (Ala. Code § 8-6-20) and (2) selling unregistered stock (Ala. Code § 8-6-19). With respect to the first claim, the Eleventh Circuit held that the Request for Admissions and other evidence introduced by Petitioners was insufficient to make out a *prima facie* case under the statute. As to the second claim, the court held Petitioners' evidence was insufficient to go to the jury on alleged offers of stock to more than ten persons. (As to the second claim, Respondents contended that the offer or sale to Petitioners was exempted under Ala. Code § 8-6-11(a)(9).) It is clear that the Eleventh Circuit's decision is premised upon the state of the record, *i.e.*, sufficiency of the evidence. The Eleventh Circuit simply held that a reasonable jury could not find that more than nine offers had been made (the pertinent exemption being for ten or less offers or sales). The reference to waiver does not appear in a footnote; however, those remarks are noted in passing and were not central to the court's decision.

Accordingly, none of the grounds in Supreme Court Rule 17.1 are present. The opinion involves no compelling legal question, but simply the state of the record on review of a directed verdict. The Petition is due to be summarily overruled. *See, e.g., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

2. *Stacking of Exemptions v. Integration of Contemporaneous Offerings.*

Petitioners' assertion that this is a valid issue for review by certiorari is astonishing. The Eleventh Circuit's entire discussion of the alleged offer to "existing shareholders" consists of the following:

2. *Offers Rules Insufficient:* The district court considered testimony as to various offers allegedly made by PRS, including an alleged offer in April 1978 to the nine existing shareholders of the company, and found the allegations insufficient to warrant submission to a jury. *We have examined the evidence on each of the purported offers and concur with the district court's rulings.*

734 F.2d at 1434 (emphasis added).

Unquestionably the Eleventh Circuit's review was limited to a review of the evidence — not the legal question of "exemption stacking." There is no legal issue raised in the opinion and the suggestion that there is a legal issue for this Court's review is illusory, if not misleading.

3. *Sufficiency of Evidence of Insolvency.*

Again, Petitioners, in essence, ask this Court to review the sufficiency of the evidence to determine if a directed verdict was appropriate. Such review is not a ground listed in Supreme Court Rule 17.1 for certiorari and this Court, with all the demands placed upon it, should not be asked

to review the sufficiency of evidence on a motion for directed verdict. Petitioners do not even argue that a controlling question of law is involved in this ground. As an aside, Petitioners' assertion at page 27 of the Petition that Respondents did not assert the referenced contentions as to "book value" in the lower courts is a direct misstatement and it is disturbing that Petitioners would make such a statement to the Court.

Accordingly, the Writ is due to be denied.

4. *Directed Verdict Based Only on Defendants' Testimony.*

As with the preceding issue, this ground is simply a sufficiency of the evidence question and will not support issuance of the Writ.

5. *Hearsay Evidence Exceptions.*

Petitioners expressly state that they do not raise this issue as a reason for granting certiorari so further comment is unnecessary.

CONCLUSION

The Eleventh Circuit's opinion made no interpretation of the Securities Act of Alabama. There is no question of law involved which is postured for resolution by this Court. On appeal, the case was simply decided on the sufficiency of the evidence and the directed verdicts granted by the district court were correctly affirmed.

Similarly, the case involves no legal questions under the state or federal securities laws, such as to be frequently litigated in the federal courts. This case simply involves the sufficiency of the evidence in a securities case. Likewise, there are no Constitutional questions raised, nor conflicts

between the circuits, nor conflicts between the federal and state courts.

Although it would be an honor to address this Court, this particular case is not worthy of presentation to the Court and should be allowed to regain its humble place amongst the vast array of cases which are the daily labors of the lower courts.

Respectfully submitted,

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